FEB 27 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74—934.

STATE OF NEW YORK,

Respondent,

against

ANTHONY HUESTON, also known as TONY DEJEST and BONNIE KERR,

Petitioners.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

KENNETH GRIBETZ,
District Attorney, County of Rockland,
Counsel for Respondent,
Rockland County Court House
New City, N. Y. 10956
(914) 638-0500.

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STATE OF NEW YORK,

Respondent,

against

ANTHONY HUESTON, also known as Tony DeJest and BONNIE KERR,

Petitioners.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

Jurisdiction.

The petition for certiorari assets that the denial of petitioners' motion for a certificate granting leave to further appeal to the New York Court of Appeals, dated October 30, 1974 (Petition p. 2), "* * * is a determination by the highest State Court in which a decision could be had."

The point cannot be sincerely pressed since petitioners are still litigating this matter in the appellate courts of New York State; and petitioner, Bonnie Kerr, has an appeal pending in the Court of Appeals (2d Circuit) from the decision of United States District Judge Inzer B. Wyatt, denying a Writ of Habeas Corpus.

Set forth in respondent's appendix are the various applications presented to the lower courts by petitioners

which have brought about a striking inconsistency in position, in contrast to the above statement that a final disposition has been had, and reflecting the ongoing presentation of their cause in the New York Appellate Division, Second Judicial Department, and the Federal Court of Appeals.

Brought about by petitioner's conflicting positions, respondent's arguments require similar variance. Respondent submits that this Court lacks jurisdiction to entertain the petition for the first reason, namely, that a final judgment or decree exists, and, the petition has not been timely filed pursuant to Rule 22, subdivision 2 Revised Rules of the Supreme Court of the United States.

In its order of May 2, 1974 (Petitioners' Appendix A), the New York Court of Appeals in denying petitioners' motion to suppress the evidence, ordered, "the matter remitted to the Appellate Division for further proceedings in accordance with this opinion (i. e., for consideration of questions of fact, if any, raised on the appeal to that Court [see C.P.L. 470.25 subd. 2, par. (d); 470.40, subd. 2, par. (b)])."

In so remitting, the function and authority of the Court of Appeals ceased, since, on the remand, any questions of fact were to be determined by the Appellate Division, and they would not be further reviewed by the Court of Appeals under the well-established and strictly-adhered-to rule that the New York State Court of Appeals will not in non-capital criminal cases consider questions of fact (Cohen-Karger, "The Powers of the New York Court of Appeals." Scope of Review in non-capital cases, p. 742, Section 198 [a]):

> "In non-capital cases only questions of law, properly presented by the record, are open for review in the Court of Appeals; the Court has no power to review questions of fact." (citing footnote cases.)

On the remittitur, the Appellate Division in a decision and order dated October 9, 1974 (Respondent's Appendix A), affirmed the County Court order and judgment, constrained by the Court of Appeals; no questions of fact were raised or passed upon.

The conclusion is authorized that neither the May 2, 1974 order of the Court of Appeals, nor the October 9, 1974 order of the Appellate Division were of interlocutory or intermediate nature. Under the most favorable aspect of either order, or either date, it is at once apparent that the petition by virtue of the 90-day limitation is untimely and this Court lacks jurisdiction to entertain it; the time for applying for the petition has not been extended nor any application for extension presented.

Pending Appeals.

Petitioners insist that they still have remedies available to them which they are pursuing; by orders to show cause, dated December 2, 1974, issued by the Hon. Frank A. Gulotta, Presiding Justice, Appellate Division, Second Judicial Department, New York, both petitioners, in separate applications sought stay of execution; the ground for the application was the claim, by both, that they had been inadequately represented by counsel; petitioner, Kerr, claiming counsel was indifferent to her interests over the five-year period he had represented her because his fee had been paid by petitioner, Hueston; the latter asserting that counsel displayed "demonstrated incompetence in handling the trial, and the subsequent appeals." We reproduce the initial Order to Show Cause

by petitioner, Hueston; the Order to Show Cause by petitioner, Kerr, is similar in content, and somewhat more restrained (Respondent's Appendix B).

The counsel so charged is none other than George J. Bellantoni, Esq., who represented both petitioners since late 1969; recently represented them in an application, dated November 14, 1974, to this Court for a stay of execution pending certiorari which was denied by the Hon. Thurgood Marshall, and who appears as counsel on this petition.

The applications to the Appellate Division for stay pending reargument were denied; however, permission was granted petitioners to present their claims to the trial court (County Court, Rockland County, New York); the orders appear in Respondent's Appendix C.

Petitioners next instituted by orders to show cause issued by the County Court, proceedings to vacate their sentences and the judgment, claiming illegal sentencing; incompetent counsel, and a failure of counsel to protect their rights, thereby depriving them of due process (Respondent's Appendix D).

The County Court, Rockland County, rendered its decision, and entered its order on January 6, 1975; after denying the applications for re-sentence and vacatur of the judgment, the Court took the occasion to volunteer that:

> "It would appear from the trial record that there was error regarding the admission of certain evidence which would not only present grounds for appeal, but, in this Court's opinion, might constitute reversible error."

To reargue the appeal, the County Court (to some court), "respectfully urged that the interests of justice and the fundamental principles of justice demand that such an application be made in the appropriate forum" (Respondent's Appendix E).

Thus encouraged, petitioners returned to the Appellate Division, again by order to show cause issued January 8, 1975, for the relief denied them by the County Court; the Appellate Division, in treating the applications, considered them as seeking permission to appeal the County Court denial, and granted petitioner's leave to appeal to the Appellate Division (Respondent's Appendix F).

The orders, and certificates granting leave are set forth in Respondent's Appendix G.

In addition to the foregoing activities, petitioner, Kerr, moved by order to show cause, issued out of the United States District Court for the Southern District of New York, by the Hon. Inzer B. Wyatt, dated December 3, 1974, for writ of habeas corpus, claiming violation of her Fourth, Fifth, and Fourteenth Amendment constitutional rights (Respondent's Appendix H).

The petition was denied, Judge Wyatt stating that "a certificate of probable cause will issue (28 U. S. C., Sec. 2253)" (Respondent's Appendix I).

Petitioner Kerr, has duly filed a notice of appeal to the Court of Appeals (2d Circuit) on January 27, 1975 (Respondent's Appendix J).

ARGUMENT.

POINT I.

The rules of this Court require that a petition for writ of certiorari must be filed within ninety days after the entry of judgment in a state court of last resort in a criminal case.

The judgment of the New York Court of Appeals in this matter is dated May 2, 1974; there remained no other issue or question before that court—it not being empowered to review any questions of fact petitioners raised on the whole appeal to the Appellate Division.

No questions of fact were presented to the Appellate Division, either arising from the trial, or the hearing on the eavesdropping warrant; it is obvious from the Court of Appeals judgment that it did not intend to consider or determine any further than its remittitur reads; that its determination, insofar as the Court of Appeals was concerned was a final disposition of the case.

Consequently petitioners' efforts to review that judgment by filing this petition runs afoul of the cited rule, and deprives the Court of jurisdiction to entertain it; the application for leave to further appeal was a vain act and did not serve to extend the time for filing the petition since the Court of Appeals expressly rejects a review of factual questions, which as stated, were not at all involved in the prosecution of petitioners' appeals.

POINT II.

It is a safe assumption, from the above applications, that petitioners are not at all convinced that they have exhausted all state, or lower court remedies; overlooked or ignored by petitioners is the fact that they have pending, leave to reargue their claims in the New York Appellate Division, and, review by appeal to the Second Circuit Court of Appeals of the denial of the writ of habeas corpus; there are, therefore, through the medium of successive applications, petitions, or appeals, three separate forums for relief from the sentence and judgment.

Anomalous indeed, is the piecemeal approach adopted by petitioners in representing to the lower appellate courts, both state and federal, their newly-arrived-at claims of inadequacy of counsel, and deprivation of rights and due process; from the diversity and persistency of their applications, if the same are rejected in the lower courts, surely further appellate process can be anticipated, thus further fragmenting their claimed grievances.

Statement of the Case.

On June 2, 1969, an eavesdropping warrant was issued by the late Honorable Clare J. Hoyt, Justice of the Supreme Court, Ninth Judicial District (and now deceased as of February 20 1970); the warrant was issued at the instance of the New York State Police and authorized the tapping of respondent Kerr's telephone. The concluding paragraph of the warrant read as follows:

> "That notice to the said Tony DeJeste and Bonnie Kerr is hereby expressly waived." (Heuston was known as "DeJeste.")

The warrant was to be effective for a twenty (20) day period, expiring at the close of the calendar day, June 22, 1969; subsequently additional supporting affidavits were submitted to Justice Hoyt, and the original warrant was extended to expire on July 10, 1969.

Grounded on information received from intercepted conversations, a search warrant was issued on July 5, 1969, authorizing the search of the premises of petitioner Kerr, the place of installation of the tapped telephone.

On July 10, 1969, the search warrant was executed by the State Police at Kerr's apartment in Spring Valley, New York. The seizure consisted of drugs and drug chemicals, and a quantity of slugs designed for use in vending machines. Indictments were returned against both petitioners on August 12, 1969; Kerr for Criminal Possession of Dangerous Drugs, Third and Fourth Degrees, and Heuston on the same charges; in addition by separate indictment Heuston was charged with illegal possession of the coin-machine slugs.

Petitioners were tried on the indictments in the County Court, Rockland County, and a guilty verdict rendered against both on March 11, 1971. Sentence was imposed on April 21, 1971; Kerr, on conviction of Possession, Third Degree, received a sentence of one (1) years in the Rockland County Jail; for Possession, Fourth Degree, a sentence of six (6) months in the County Jail, to run concurrently. Heuston, for Possession, Third Degree, an indeterminate sentence not to exceed four (4) years, for Possession, Fourth Degree, a sentence of one (1) year in the County Jail; for unlawful possession of the slugs, three (3) months in the County Jail, the last two sentences to run concurrently with the first sentence.

Facts.

Petitioners by notice of motion dated September 26, 1969, returnable September 29, 1969, moved for an order of the County Court, Rockland County, directing the District Attorney to furnish copies of the eavesdropping warrant and the affidavits used in connection with its issuance (A-35).

The motion was denied (Hon. Theodore A. Kelly, County Judge) without prejudice to renewal; the basis of the denial being failure of the moving affirmation to furnish sufficient facts upon which the requested relief could be granted. The decision of the court, dated January 15, 1970 (A-38), directed that an order be submitted. In the period between submission of the motion, and the decision, the attorney for the petitioners who had represented them from the date of arrest was substituted by new counsel. It does not appear that any implementing order was ever submitted in accordance with the decision referred to immediately above.

Substituted (and present) counsel for the petitioners, by notice of motion dated January 28, 1970, returnable February 9, 1970, brought on a motion for the same relief, the motion was granted, and in compliance with the order entered thereon copies of the requested documents were furnished.

Based on the information supplied, Petitioners' counsel, by notice of motion dated May 15, 1970, returnable August 17, 1970, moved to suppress the intercepted conversations and for the inclusion of any evidence obtained thereby. The motion was denied (decision, Petitioner's Appendix E), and the order dated December 3, 1970, entered on the decision is the first of the two orders reversed by the Appellate Division.

Thereafter, and by notice of motion dated February 18, 1971, returnable on February 22, 1971, petitioners further moved to suppress the evidence seized as the result of the search warrant which had been issued as described previously, on the basis of the intercepted conversations.

The motion was denied by the decision and order of the County Court, entered on March 1, 1971; this order was the second of the two orders reversed by the Appellate Division.

Trial and conviction of the petitioners followed. Between the conviction (March 11, 1971) and sentence (April 21, 1971), the respondent Heuston was indicted with one Eastman, in the U. S. District Court, Middle District of Pennsylvania, charged with the unlawful manufacture of drugs in violation of Federal statutes.

The Federal case was based on information and evidence supplied the Federal authorities from the intercepted conversations of the eavesdropping and search warrants involved here; copies of the warrants were furnished to the U. S. Attorney in the Pennsylvania district for examination by the District Court Judge. The documents were supplied by reason of the motion to suppress the intercepted conversations and evidence brought on by Heuston in the District Court.

The District Court granted the motion to suppress, citing the New York State and Federal Eavesdropping statutes and finding the warrant did not conform. (*United States v. Eastman,* 326 F. Supp. 1038; May 27, 1971.)

The U. S. Attorney appealed, and on appeal the U. S. Court of Appeals, Third Circuit, affirmed the order of suppression. (*United States v. Eastman,* 465 F. 2d 1057; August 8, 1972.)

Both the U. S. District Court and the U. S. Court of Appeals held the June 2nd, 1969 warrant, and the evidence obtained thereby, were to be regarded as having been obtained in violation of Chapter 119, Title 18, U. S. Code, 18 U. S. C. §2510, *et seq.,* and were therefore deemed inadmissible in the Federal prosecution of the respondent Heuston. Consequent on the decision, the U. S. Attorney caused the Federal indictment against Heuston to be dismissed on February 14, 1973.

The majority opinion of the Appellate Division agreed with the Federal holdings on the inadmissibility of the warrant, and evidence; the Appellate Division ordered a new trial for both petitioners.

Injected into the case for the first time are allegations and statements made concerning an eavesdropping warrant issued to one Marge Youmans (Brief, p. 12); the claimed infirmity of the Youmans warrant it is argued, has tainted the warrant under consideration; nowhere in the prolonged history and litigation of this case has the point been presented for initial judicial consideration—nor has any reliance thereon hitherto been asserted; respondent would urge the presentation of that warrant as another instance of fractionalized contentions which have neither been offered for adversary presentation, or opportunity to challenge the facts as alleged; the rescurrection of that warrant, at this time, is most inappropriate—an unsubstantiated unproved desperate gesture.

ARGUMENT.

POINT III.

The decision of the New York State Court of Appeals is supportable.

The heart of the Court of Appeals, Third Circuit decision appears as follows (p. 1062) (Appendix C):

> "The touchstone of our decision on this aspect of the case at bar is not one in which an inventory was delayed but rather is one in which specific provisions of Title III were deliberately and advertently not followed.
>
> "In other words the failure to file the notice or inventory is no mere ministerial act. It resulted from a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public. This we cannot countenance. The communications were unlawfully intercepted. Therefore, the provisions of §2518(10) (a) (i) apply and the motion to suppress must be granted."

To accept this harsh construction of the judicial supervision of the warrant by the late Justice Hoyt would attribute to him an utter disregard of the statutes in effect at the time. It should be borne in mind that the Title III Eavesdropping Warrant statutes were extensively amended or repealed by the New York State Legislature in an effort to follow the guidelines governing eavesdropping set by the U. S. Supreme Court; the changes were frequent, and successively restrictive in insuring that constitutional safeguards were observed.

The warrant in question was directly in the middle of the rule changes, in fact, its duration straddled the date change of June 25, 1969. It was originally issued June

2, 1969, to expire June 22, 1969—and was extended to include July 10, 1969, when it was discontinued.

In effect at issue were the provisions of Chapter 546, Laws 1968, effective June 5, 1968, Section 823 of the Code of Criminal Procedure; without quoting in full, so much of the statute as is applicable to this appeal appears:

> "* * * Eavesdropping warrants; notice and return. 1. Not later than sixty days after termination of the eavesdropping warrant or any renewals thereof, except as otherwise provided in subdivision two of this section, written notice of issuance of the eavesdropping warrant and of the period of authorized eavesdropping must be personally served upon the person named in the warrant whose conversations were sought to be overheard, or upon the owner, lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.
>
> "2. On a showing of exigent circumstances to the issuing justice the serving of the notice required by this section may be postponed by order of the justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances * * *."

Chapter 1147, Laws 1969, effective June 25, 1969, enlarged the time for the sixty-day notice of the warrant, to a ninety-day period following removal or discontinuance of the wire tap: therefore under the statute, on July

10, 1969, the date of this tap removal notice of the warrant could have been properly given anytime up until October 10, 1969.

Having actual knowledge of the tap before that October date, the defendant's attorney brought on his motion for copies of the warrant and supporting affidavits on September 26th, 1969. There is nothing in the record of this prosecution by which it can be determined that the petitioners were in any way prejudiced by the omission to give the written ninety-days notice, nor has ever any such claim been presented.

There would also appear to be no solid legal ground for the very strained interpretation made by the Federal Court that by a failure to eliminate the objectionable "waiver" provision Judge Hoyt "deliberately flouted and denigrated the provisions of Title III * * *." The obvious purpose of the statement was to eliminate the giving of any advance notice of the warrant to the respondents at the time the warrant was executed. The common-sense approach was as stated in the Appellate Division dissenting opinion:

> "Indeed, such a requirement would vitiate the utility of any eavesdropping warrant."

To borrow from the Circuit Court's opinion, quoting Mr. Justice Clark in *Berger v. New York,* 388 U. S. 41, 60:

> "Finally, the statute's procedure, necessarily, because its success depends on secrecy * * *"

The dissenting opinion cites *U. S. v. Wolk,* 466 F. 2d 1143, Circuit Court of Appeals, Eighth Circuit (August 30, 1972), and an extract from that decision is fitting here

as valid reason for eliminating prior notice of any eavesdropping warrant (p. 1145):

> "However, the viability of wire-tapping as a law enforcement tool is conditioned upon secrecy before the tap."

The view of the court in *Wolk* may be summarized in the statement (p. 1145), and can be treated as embodying the principle that should obtain here:

> "Arguably, then, when a person has actual notice that his conversations have been intercepted, both the statutory and constitutional requirements have been substantially complied with.
>
> • • •
>
> "We do not believe that the use of formal inventories is an end into itself. Surely neither the Congress nor the constitution would require such emphasis of form over substance as the appellees would have us promulgate" (p. 1146).
>
> • • •
>
> "To us the statute is concerned with adequate notice and not formalities" (p. 1146).

POINT IV.

The error was non-prejudicial to petitioners.

In support of the motion made by respondents' attorney, Paul I. Auerbach, in the September 26th, 1969 motion, Mr. Auerbach submitted an affirmation (undated) (Petitioner's Appendix F) in which he stated:

> "That your affirmant did send the Defendants in this case to the County Courthouse in Newburgh in order to obtain a copy of the Affirmation and

> Search Warrant. That your affirmant received a telephone call from the secretary of the Judge that issued the Warrant to the effect that a copy of the Warrant, Affirmations and return on the wire tapping order would have to be gotten through the District Attorney's Office in Rockland County."

It is plain and obvious that at least on September 26th, 1969, both the petitioners and their counsel had full knowledge of the existence of the warrants; in such an instance, and no claim of prejudice ever having been raised by the lack of written notice, the "waiver notice" was a technical error and might be disregarded.

As the court declared in the *People v. Gnozzo* case (eavesdropping), 31 N. Y. 2d 134, 141:

> "Any error, if there were error, was technical and should be overlooked (cf. *People v. Glen,* 30 N. Y. 2d 252, 261-262; *People v. Varney,* 32 A. D. 2d 181)."

The same principle was earlier announced in the case cited, *People v. Glen, supra*:

> "In concluding this principal issue, it is worth repeating the admonition in *United States v. Ventresca* (380 U. S. at page 108) that the requirements of the Fourth Amendment are 'practical and not abstract' and that warrants should be scrutinized in a 'commonsense and realistic fashion.' "

Respondent, would also respectfully direct this Court's attention to the cases cited in the opinion of Judge Wyatt; *United States v. Manfredi,* 488 F. 2d 588, 601-602 (2d Cir. 1973), cert. denied, 94 S. Ct. 2651 (June 3, 1974); *United States v. Rizzo,* 492 F. 2d 443, 447 (2d Cir.), cert. denied, 94 S. Ct. 3969 (June 10, 1974), as particularly relevant to the issue presented.

CONCLUSION.

Based on the foregoing, respondent submits the petition should be denied.

Dated: New City, N. Y.,
February , 1975.

Respectfully submitted,

KENNETH GRIBETZ,
District Attorney,
Counsel for Respondent,
County of Rockland,
Courthouse,
New City, N. Y. 10956

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STATE OF NEW YORK,

Respondent,

against

ANTHONY HUESTON, also known as TONY DEJEST and BONNIE KERR,

Petitioners.

RESPONDENT'S APPENDIX.

KENNETH GRIBETZ,
District Attorney, County of Rockland,
Counsel for Respondent,
Rockland County Court
House
New City, N. Y. 10956
(914) 638-0500.

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Appendix A—Order on Remittitur of the Court of Appeals.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 9, 1974.

Hon. Frank A. Gulotta,
Presiding Justice,
Hon. James D. Hopkins,
Hon. Henry J. Latham,
Hon. Arthur D. Brennan
Hon. A. David Benjamin,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

ANTHONY HEUSTON, also known as Tony DeJeste and BONNIE KERR,

Appellants.

The above named The People of the State of New York, respondent in this action, having appealed to the Court of Appeals of the State of New York from an order of this court dated August 13, 1973, reversing on the law (a) two orders of the County Court, Rockland County, dated December 3, 1970 and March 1, 1971, respectively, both of which denied defendants' applications to suppress certain evidence, and (b) a judgment of the same court, rendered April 20, 1971, which convicted defendants of certain crimes, after a jury trial, and imposed sentence; the said

appeal having been heard and determined by the Court of Appeals and that court having adjudged that the order of this court so appealed from be reversed and having remitted the case to this court for its consideration of the facts, if any; and after due deliberation, and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said orders and judgment of the County Court, Rockland County, are hereby unanimously affirmed.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

Appendix A—Order on Remittitur of the Court of Appeals

mc

No. 3318 THE PEOPLE, etc.,

Respondent,

v.

ANTHONY HEUSTON, also known as Tony DeJeste and BONNIE KERR,

Appellants.

This case has been remitted by the Court of Appeals to this court. By our previous decision (1113 E/73) we reversed, on the law, (a) two orders of the County Court, Rockland County, dated December 3, 1970 and March 1, 1971, respectively, both of which denied defendants' applications to suppress certain evidence, and (b) a judgment of the same court, rendered April 20, 1971, which convicted defendants of certain crimes, after a jury trial, and imposed sentence, but the Court of Appeals reversed our order stating in its opinion that the suppression motions should be denied, and remitted the case to this court for consideration of questions of fact, if any, raised on the appeal to this court (*People v. Heuston*, 34 N. Y. 2d 116, revg. 42 A. D. 2d 860).

This court now affirms the orders and the judgment. No opinion.

Gulotta, P.J., Hopkins, Latham, Brennan and Benjamin, JJ., concur.

Appendix B—Order to Show Cause.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

against

ANTHONY HEUSTON, also known as Tony DeJeste and BONNIE KERR,

Defendants-Appellants.

Present:

Upon reading the annexed affidavit of Richard T. Monahan, and upon all the pleadings and proceedings heretofore had herein,

LET the District Attorney of Rockland County show cause at a motion term of the Supreme Court of the State of New York, Appellate Division, 2d Department, to be held at the Courthouse hereof, located at Monroe Place on the 9th day of December, 1974, at 9:30 o'clock on said day or as soon thereafter as counsel can be heard, why the defendant-appellant should not have argument of the appeal and why on such reargument this court should not modify the sentence and why the defendant-appellant should not have such other, further and different relief as may be just and proper under the circumstances.

In the meantime, pending the hearing and determination of this application and the entry of an order thereon and service of a copy thereof with notice of entry, let pro-

ceedings on the part of the plaintiff-respondent herein be and hereby is stayed, except to oppose the within application; and

Sufficient reason appearing therefor, let service of a copy of this order to show cause and the annexed affidavit of Richard T. Monahan, Esq., attorney for the plaintiff-respondent herein on or before the 2nd day of December, 1974, be deemed sufficient for all purposes herein.

Dated: New City, New York
December 2, 1974

s/ FRANK A. GULOTTA
Justice of the Appellate
Division
Presiding, Second Dept.

Appendix B—Affidavit of Richard T. Monahan.

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF ROCKLAND.

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

ANTHONY HEUSTON, also known as Tony DeJeste and BONNIE KERR,

Defendants.

State of New York,
County of Rockland, ss:

RICHARD T. MONAHAN, being duly sworn, deposes and says:

FIRST: That he has been substituted as attorney for the above named defendants, and as such. is authorized to act on their behalf.

SECOND: That he is an attorney admitted to practice in the State of New York.

THIRD: That this affidavit is submitted in support of the within motion seeking a stay pending an appeal of the conviction of Anthony Hueston, also known as Tony DeJeste, on March 11, 1971.

FOURTH: That your deponent would like to set forth a brief history of the above case in order to fully apprise this Court of the merits of this motion.

FIFTH: That defendants were jointly indicted for criminal possession of a dangerous drug in the fourth degree and criminal possession of a dangerous drug in the third degree, and were subsequently indicted on August 12, 1969.

Appendix B—Affidavit of Richard T. Monahan

SIXTH: Defendants then went to trial in March, 1971, and were convicted after trial for possession of dangerous drugs as a felony, possession of dangerous drugs as a misdemeanor, and possession of slugs as a misdemeanor. On April 21, 1971, defendant, Anthony Hueston, was sentenced to an indeterminate sentence not to exceed four years on a felony count, to one year in Rockland County Jail on a second misdemeanor count, and to three months in the Rockland County Jail on a third misdemeanor count. Said sentences are to run concurrently. On the same date, defendant, Bonnie Kerr was sentenced to one year in Rockland County Jail on a felony count, and up to six months in Rockland County Jail on a misdemeanor count. Said sentences are to run concurrently. A certificate of reasonable doubt was issued by Supreme Court Justice of the State of New York pending an appeal to the Appellate Division, Second Judiciary Department, State of New York. Mr. Hueston was released on $15,000.00 secured bond, and Miss Kerr was released on $2500.00 secured bond.

SEVENTH: George J. Bellantoni, Esq., who represented both defendants at the trial, undertook their appeal by serving a notice of appeal on the District Attorney of Rockland County within the 30 day period prescribed. Thereafter, Mr. Bellantoni, in attempting to perfect the appeal of the defendants, took the position that the issuance of a search warrant was obtained through information of an illegal wiretap. This was the only basis upon which the defendants' attorney presented his appeal.

EIGHTH: That it is your deponent's contention that Mr. Bellantoni demonstrated in competence because a cursory examination of the transcript of the trial indicated conviction against both defendants would be reverse as a matter of law.

NINTH: That in the case of defendant, Bonnie Kerr, that as a matter of law, the indictment against her should have been dismissed since not one shred of evidence had been put forth by the prosecution to connect her in any way at least with the felony part of the indictment.

TENTH: That the permitting in evidence of People's Exhibit 1 which purportedly contained a quantity of dangerous drugs allegedly found in the apartment of the defendants was reversible error. That during the *voir dire* of Mr. Bellantoni, the testimony adduced from the witness who had custody and control of the alleged package of drugs stated that he could not identify this as the package he had confiscated in the defendants' apartment since it did not bear his mark. The permitting of this into evidence over the defendants' objection goes right to the heart of this case.

ELEVENTH: That this motion for permission of a stay pending the appeal to the Appellate Division is made by way of Order to Show Cause because time is of the essence in that defendants have been asked to surrender to the Sheriff's Office on Monday, December 2, 1974, to begin their respective jail sentences.

TWELFTH: That Mr. Bellantoni, attorney for defendants, was well aware of these errors and the other errors committed during this trial and did nothing with reference to the appeal in protecting the rights of his clients. That justice requires that defendants be given leave to appeal this case from its broadest terms in order to protect their constitutional rights.

THIRTEENTH: That defendants should not be penalized for what their attorney should have done, but did not do. Defendants placed their trust and confidence in their attorney, expecting that he would prosecute their appeal with the ordinary degree of skill and care one would ex-

pect of an attorney practicing criminal law. Defendants have no recourse in this matter since their freedom at the present time is seriously in jeopardy and the appeal processes which under law they are entitled to were not carried out on their behalf.

FOURTEENTH: That no one would be seriously affected by granting this stay pending appeal in that Anthony Hueston for the past three years has been in business for himself in Rockland County, and has demonstrated a trustworthiness and reliability which would permit allowing him to remain at large without the fear that he would flee the jurisdiction of this court.

FIFTEENTH: That defendant, Bonnie Kerr, is now married and working and has also demonstrated over the past three years exemplary character to enable her to remain free from incarceration during the pendency of an appeal.

SIXTEENTH: That your deponent will submit for the Court's perusal his only copy of the transcript of trial which is in excess of 700 pages. The record is replete with errors that if taken singularly on their own would be grounds for reversal as a matter of law, but cumulatively, there is no question that upon a proper appeal convictions against defendants would be reversed.

SEVENTEENTH: That Mr. Bellantoni did not properly appeal this case, and not to permit the defendants the right of appeal at this time would cause an injustice, and certainly would deprive the defendants of due process and violate their constitutional rights.

EIGHTEENTH: That the District Attorney's Office has not moved to dismiss appeal for failure to prosecute, and as such, defendants' right to appeal still exists.

Appendix B—Affidavit of Richard T. Monahan

WHEREFORE, your deponent prays that an order be granted permiting defendants to remain free on bail pending an appeal on the merits of the trial and the conviction after trial of the defendants, and staying the Sheriff's Office from taking into custody the defendants on December 2, 1974, or in the alternative, a hearing be had as soon as possible to determine whether stay should be continued.

RICHARD T. MONAHAN

Sworn to before me this
27th day of November, 1974.
BENJAMIN M. GOLDSTEIN
Notary Public, State of New York
Sullivan County Clerk's # 104
Commission Expires March 30, 1975

Appendix C—Orders.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 12, 1974.

Hon. Frank A. Gulotta,
Presiding Justice,
Hon. James D. Hopkins,
Hon. Henry J. Latham,
Hon. Arthur D. Brennan,
Hon. A. David Benjamin,
Associate Justices.

In the Matter

of

Bonnie Kerr,

Petitioner,

Hon. Robert R. Meehan, District Attorney, Rockland County,

Respondent.

Order.

In the above entitled cause, the petitioner having moved to stay enforcement of order of commitment of the petitioner, pending the hearing on the resentence of said petitioner;

Now, upon the papers filed in relation to the motion, and the motion having been duly submitted and due deliberation having been had thereon, it is

Ordered that the motion is hereby denied.

Enter:

IRVING N. SELKIN
Clerk of Appellate Division

Appendix C—Orders

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 12, 1974.

Hon. Frank A. Gulotta,
Presiding Justice,
Hon. James D. Hopkins,
Hon. Henry J. Latham,
Hon. Arthur D. Brennan,
Hon. A. David Benjamin,
Associate Justices.

THE PEOPLE, etc.,

Respondent,

v.

ANTHONY HUESTON a/k/a Tony DeJeste and BONNIE KERR,

Appellants.

Order.

In the above entitled cause, appellant Anthony Hueston having moved for reargument of his appeal from a judgment of the County Court, Rockland County, rendered April 20, 1971 and to stay execution of the commitment order, pending determination of said appeal on reargument;

Now, upon the papers filed in support of and in opposition to the motion, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby denied, without prejudice to an application in the trial court in the nature of *coram nobis* pursuant to article 440 of the CPL.

Enter:

IRVING N. SELKIN
Clerk of Appellate Division

Received
Dec 19 1974
Dec 20 1974
Rockland County
District Attorney's
Office

Appendix D—Orders to Show Cause.

COUNTY COURT OF THE STATE OF NEW YORK,

COUNTY OF ROCKLAND.

IN THE MATTER

of

The Application of BONNIE KERR,

Petitioner,

In the nature of a writ of error *Coram Nobis* for relief under Title M of the Criminal Procedure Law.

Indictment No.
69/71
69/72
Index No. 2843/69

Order to Show Cause.

Upon reading and filing the annexed affidavit of Bonnie Kerr, sworn to the 16th day of December, 1974, the affirmation of L. Rissier Bernard, sworn to the 16th day of December, 1974 and upon all the proceedings heretofore had in *People of the State of New York v. Anthony Hueston, also known as Tony de Jeste,*

LET the defendant, The People of the State of New York, by Honorable Robert R. Meehan, show cause at a Special Term of this Court, located at the County Courthouse, New City, State of New York, on the 18th day of December, 1974 at 4:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, why an order shall not be made in this action vacating the

sentence imposed upon Bonnie Kerr, after conviction, on the grounds that the sentence was unduly harsh, excessive and illegally imposed and otherwise invalid as a matter of law, and that a hearing *coram nobis* be held to determine whether the said Bonnie Kerr had counsel on her appeal adequate to protect her rights and whether due process was had under the Constitution of the United States, and for such other and further relief as to the Court may seem just and proper.

LET service of the within order to show cause upon the District Attorney of Rockland County on or before the 16th day of December, 1974, be deemed good and proper service.

Dated: December 16, 1974.

Enter,

HONORABLE ROBERT J. STOLARIK
J. C. C.

Appendix D—Orders to Show Cause

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF ROCKLAND.

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

ANTHONY HUESTON,

Defendant.

69-71
69-72

Order to Show Cause.

Present:

On the affirmation of Richard T. Monahan, attorney for defendant, and all proceedings heretofore had herein,

Now, on motion of Richard T. Monahan, attorney for defendant, let the People show cause at a Special Term, Part I hereof, to be held in and for the County of Rockland, at the County Courthouse, New York, on the 18th day of December, 1974, at 4 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made vacating the sentence imposed after conviction upon the defendant, Anthony Hueston, on the ground that it was unduly harsh, excessive, unauthorized, illegally imposed, or otherwise invalid as a

matter of law, and that a hearing on *Coram Nobis* be held to ascertain whether the procedural steps of appeal on behalf of defendant provided adequate counsel and representation on behalf of Anthony Hueston, to protect his rights and due process under the Constitution of the United States, and for such other and further relief as the Court may deem just and proper. That personal service of a copy of this order be accomplished by 5:00 P.M. on Dec. 16, 1974.

Dated: December 13, 1974.

Enter

s/ ROBERT STOLARIK
J. C. C.

Appendix E—Decision and Order.

COUNTY COURT,

ROCKLAND COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK

against

ANTHONY HEUSTON, also known as Tony DeJeste and BONNIE KERR,

Defendants.

Ind. No. 69-71
69-72

Hon. Kenneth Gribetz, District Attorney of Rockland County for the People.

Richard T. Monahan, Esquire, Attorney for Defendant Hueston.

Windheim, Bernard & Prindle, Esqs., Attorneys for Defendant Kerr.

ROBERT J. STOLARIK, County Judge:

This is a proceeding in the nature of an application for a writ of error *coram nobis* pursuant to Article 440 of the Criminal Procedure Law. Both defendants have retained individual counsel and have made separate application, but for the purposes of this decision, the application shall be considered as having been jointly made.

Defendant Hueston was convicted of Criminal Possession of a Dangerous Drug in the Fourth Degree, Criminal Possession of a Dangerous Drug in the Third Degree and Unlawfully Using Slugs in the Second Degree on April 20, 1971, and defendant Kerr was convicted of Criminal

Possession of a Dangerous Drug in the Fourth Degree and Criminal Possession of a Dangerous Drug in the Third Degree on April 20, 1971. These judgments of conviction were appealed to the Appellate Division, Second Department, where said judgments were set aside. On further appeal to the New York State Court of Appeals, the judgment of the Appellate Division was reversed and the judgments of conviction were restored.

The basis of defendants' present applications are (1) excessivity of sentence and (2) incompetence of counsel.

With regard to the defendants' contention of excessivity of sentence, the Court finds that defendants have failed to allege facts to show that the sentence was unauthorized, illegally imposed or otherwise invalid as a matter of law. (Criminal Procedure Law Section 440.20 Subd. 1). Accordingly, the application to set aside the sentence is denied.

With respect to the defendants' application as it pertains to the processing of their appeals and the adequacy of counsel in their prosecution, the Court is constrained to hold that the application to set aside the judgment must be denied pursuant to Criminal Procedure Law Section 440.10 subd. 2 (c) which provides in pertinent part that ". . . the Court must deny a motion to vacate a judgment when: . . . Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's . . . unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him . . ."

On the face of the application there is nothing to indicate that defendants' present posture could not have been presented on appeal and considered at that time. A review of the trial transcript reveals possible error

which the defendants' trial attorney properly preserved for appeal and there is no basis for defendants' contention that trial counsel was incompetent. "There is a denial of effective representation of counsel only when the representation given is so patently lacking in competence or adequacy that it becomes the duty of the Court to be aware of it and correct it. Indeed, to hold otherwise would require a rule that a conviction must be vacated solely on the ground that assigned counsel was negligent or otherwise at fault in performing his duty." *People v. Tomaselli*, 7 N. Y. 2d 350, 356.

Defendants cite *People v. Callaway*, 24 N. Y. 2d 127 and *People v. Montgomery*, 24 N. Y. 2d 130, wherein the Court held that a defendant would be entitled to a resentencing to afford him an opportunity to prosecute and perfect an appeal where either the Court or the defendants' attorney failed to advise the defendant of his right to appeal. Defendants suggest that this doctrine be extended to include the instant case where the appeal was perfected and taken to the highest Court in this state on the sole issue that pretrial decisions of this Court were in error. Defendants argue that the attorney's failure to cite other grounds for appeal amounts to failure on the part of the defendants' attorney to advise the defendants of their appellate rights.

Defendants also argue that the appeal of this single issue by the defendants' former attorney amounted to an abandonment of appeals that had already been instituted. In *People v. Lampkins*, 21 N. Y. 2d 138, and *People v. DeRenzzio*, 14 N. Y. 2d 732, the Court remanded the question for a hearing to determine whether defendants had been unconstitutionally deprived of their rights to appeal where their attorneys had failed to prosecute appeals.

The Court finds that the above cases cited are not applicable to this situation where an appeal has been perfected and heard by both the Appellate Division and the

Court of Appeals. It is not the prerogative of the trial court to determine the competency of appellate counsel, but rather this determination must be made by the appellate courts. For this court to review the conviction in the manner suggested by defendants would be akin to assuming the prerogatives of an appellate court. The Court can find no justification in law under the facts presented in this application whereby this Court could assume such jurisdiction. Accordingly, the application to vacate the judgment is likewise denied.

The Court has reviewed the application and the law pertaining thereto most thoroughly, because in reviewing this petition, it would appear from the trial record that there was error regarding the admission of certain evidence which would not only present grounds for appeal, but, in this Court's opinion, might constitute reversible error. It would also appear that the record on trial was never reviewed on appeal due to the fact that the appeal was taken only from the pretrial decisions of this Court which denied the defendants' motions to suppress evidence obtained from intercepted telephonic communications and a subsequently issued search warrant based on information obtained from these intercepted communications. Accordingly, the appellate courts were never afforded the opportunity of reviewing the record on trial to discover possible errors therein.

While this Court finds no basis for relief in Article 440 of the Criminal Procedure Law, it would seem that defendants have a remedy available to them in the form of a motion to reargue the appeal. It is respectfully urged that the interests of justice and the fundamental principles of due process demand that such an application be made in the appropriate forum.

This decision shall constitute the order of the Court.

Dated: New City, New York
January 6, 1975

ROBERT J. STOLARIK
County Judge, Rockland County

Appendix F—Order to Show Cause.

STATE OF NEW YORK,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

IN THE MATTER

of

The Application of BONNIE KERR,

For relief under Article 440 of the Criminal Procedure Law.

Appellate Division #4614
Ind. No. 69-71 & 72
Index #2843/69

Upon reading and filing the annexed affirmation of L. Rissier Bernard, dated said 8th day of January 1975, and upon all of the proceedings heretofore had in the above matter and in the case of People of the State of New York v. Anthony Hueston, aka Tony deJeste and Bonnie Kerr.

LET the defendant, The People Of The State Of New York, by Hon. Kenneth Gribetz, show cause at a Special Term of this Court, located at 45 Monroe Place, in the County of Kings, State of New York, on the 13 day of January 1975 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order granting leave to renew and reargue defendant's

motion for a re-sentencing, or, in the alternative, to vacate the judgment, and it is

ORDERED that pending the determination of this motion, that the defendant, Bonnie Kerr, shall be admitted to bail.

LET service of the within order to show cause upon the District Attorney of Rockland County on or before the 8th day of January, 1975, be deemed good and proper service.

Dated: January 8, 1975

Enter

/s/ JAMES D. HOPKINS
Associate Justice, Supreme Court
Appellate Division Second Department

Appendix F—Order to Show Cause

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

against

ANTHONY HUESTON, also known as Tony DeJeste and BONNIE KERR,

Defendants-Appellants.

Order to Show Cause.

Present:

Upon reading the annexed affirmation of Richard T. Monahan, and upon all the pleadings and proceedings heretofore had herein.

LET the District Attorney of Rockland County show cause at a motion term of the Supreme Court of the State of New York, Appellate Division, 2d Department, to be held at the Courthouse hereof, located at Monroe Place on the 13th day of January, 1975, at 9:30 o'clock on said day or as soon thereafter as counsel can be heard, why the defendant-appellant should not have argument of the appeal and why on such reargument this court should not modify the sentence or in the alternative set aside the judgment and why the defendant-appellant should not have such other, further and different relief as may be just and proper under the circumstances.

Appendix F—Order to Show Cause

Sufficient reason appearing therefor, let service of a copy of this order to show cause and the annexed affirmation of Richard T. Monahan, Esq., attorney for the plaintiff-respondent herein on or before the 8th day of January, 1975, be deemed sufficient for all purposes herein.

Dated: Brooklyn, New York
January 8, 1975

JUSTICE MARTUSCELLO
Associate Justice of the Appellate
Division Second Department

Appendix G—Orders.

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

Before:

Hon. James D. Hopkins, Associate Justice.

IN THE MATTER

of

BONNIE KERR,

Petitioner,

v.

HON. ROBERT R. MEEHAN, DISTRICT ATTORNEY, ROCKLAND COUNTY,

Respondent.

Order.

In the above entitled cause, the above named Bonnie Kerr, petitioner, having moved in this court for leave to appeal thereto from an order of the County Court, Rockland County, dated January 6, 1975; and this court, by order dated January 16, 1975, having referred said motion to me for determination;

Now, upon the papers filed in support of and in opposition to the motion, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the said motion for leave to appeal to this court is hereby granted.

Dated, Brooklyn, N. Y.,
January 22, 1975.

HON. JAMES D. HOPKINS,
Associate Justice, Appellate Division,
Supreme Court, Second Judicial Department.

Appendix G—Orders

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

Before:

Hon. James D. Hopkins, Associate Justice.

THE PEOPLE, *etc.*,

Plaintiff,

v.

ANTHONY HUESTON a/k/a Tony DeJeste,

Defendant.

Certificate Granting Leave to Appeal to Appellate Division.

In the above entitled cause, the above-named Anthony Hueston a/k/a Tony DeJeste, defendant, having moved in this court for leave to appeal thereto from an order of the County Court, Rockland County, dated January 6, 1975; and this court, by order dated January 16, 1975, having referred said motion to me for determination;

Now, upon the papers filed in support of said application motion, and the papers filed in relation thereto, said motion having been duly submitted; and due deliberation having been had thereon; it is:

ORDERED that said motion for leave to appeal to this court is hereby granted.

Dated, Brooklyn, N. Y.,
January 22, 1975.

HON. JAMES D. HOPKINS,
Associate Justice, Appellate Division,
Supreme Court, Second Judicial Department.

Notice:

The defendant-appellant, within 15 days after the date hereof, must file, with the court which made the order sought to be appealed, a notice of appeal, in duplicate, and serve a copy of the notice of appeal upon the District Attorney (CPL 460.10, subds. 1, 4). An application for a transcript of minutes in question may be made to this court pursuant to CPL 460.70 (subd. 1) after the notice of appeal has been served and filed.

Appendix H—Order to Show Cause.

IN THE

UNITED STATES DICTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BONNIE KERR,

Petitioner,

against

RAYMOND A. LINDEMANN, SHERIFF OF THE COUNTY OF ROCKLAND,

Respondent.

74 Civ. 5264

Order to Show Cause for a Writ of Habeas Corpus.

Upon the annexed verified petition of Bonnie Kerr, duly sworn to the 3rd day of December, 1974, and the exhibits annexed thereto, for the issuance of a writ of habeas corpus and for release on bail or on her own recognizance pending the disposition of the said within petition for a writ of habeas corpus, it is

ORDERED that the Respondent Raymond A. Lindemann, Sheriff of the County of Rockland, show cause before this Court on the 6th day of December, 1974, at 2:30 o'clock in the afternoon of that day, in Room 705, at the United States Courthouse, Foley Square, in the City, County and State of New York, why a writ of habeas corpus should not issue herein as prayed for in the said annexed petition, and it is further,

Appendix H—Order to Show Cause

ORDERED that the personal service of a copy of this order, together with a copy of the annexed verified petition, exhibits and any and all supporting papers on which this order is granted, on Respondent Raymond A. Lindemann, or his attorney on or before December 4, 1974, at noon of that day, be deemed sufficient service.

Dated: New York, New York
December 3, 1974.

/s/ INZER B. WYATT
United States District Judge

Appendix H—Order to Show Cause

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BONNIE KERR,

Petitioner,

against

RAYMOND A. LINDEMANN, SHERIFF OF THE COUNTY OF ROCKLAND,

Respondent.

Petition for Writ of Habeas Corpus.

Petitioner's verified petition respectfully avers that:

1. The jurisdiction of this Court is invoked under 28 U.S.C. 2241 to release Petitioner from the custody of the Respondent, which custody is in violation of Petitioner's rights under the Constitution of the United States of America, including but not limited to The Fourth, Fifth and Fourteenth Amendments to said Constitution.

2. That your Petitioner Bonnie Kerr is a citizen of the State of New York and of the United States of America.

3. That on the 20th day of April, 1971, the County Court, County of Rockland, and State of New York, rendered a judgment convicting your Petitioner and a codefendant, one Anthony Hueston, of criminal possession of drugs in the third and fourth degrees. Defendant Hueston was additionally convicted of using slugs in the second degree. This judgment followed a jury trial. I was

sentenced to a term of one year and to a term of six months on the respective charges, the sentences to run concurrently. Prior to the rendering of said judgment of conviction, the County Court had made and entered two orders denying my applications to suppress certain evidence; the date of said orders being December 3, 1970, and March 1, 1971. It is this question of the suppression of evidence which is involved in this application.

4. That subsequently I appealed to the Appellate Division, Second Department, which reversed both the judgment of conviction and orders denying my motions to suppress, granted my motions to suppress, and remanded the case for a new trial in accordance with the decision. A copy of that decision of the Appellate Division, Second Department, which was reported at 347 N. Y. S. 2d 78, 42 App. Div. 860, is annexed to the verified petition and made a part hereof.

5. That it will be noted by the Court that the Appellate Division decision refers to the case of *United States v. Eastman,* 465 F. 2d 1057. In that case the very same eavesdropping warrant involved in my County Court state trial and reviewed by the Appellate Division was the subject of a motion to suppress. In *Eastman,* the District Court in Pennsylvania suppressed the evidence on the ground that the prosecution and/or police had not complied with law; and that ruling was affirmed by the Third Circuit (see citation above.) Referring to *Eastman,* the Appellate Division, Second Department stated:

> "For the reasons stated by the U. S. Court of Appeals therein, we think that the County Court erred in its denial of defendants' motion to suppress the communications intercepted pursuant to the eavesdropping warrant . . ."

6. That following the decision of the Appellate Division described above, the State obtained permission and appealed to the New York Court of Appeals; and the latter Court reversed the order of the Appellate Division, upholding the challenged eavesdropping warrant. A copy of that decision, reported at 356 N. Y. S. 2d 272, 34 N. Y. 2d 116, is annexed hereto and made a part hereof for the convenience of the Court. This Court will note that the Court of Appeals, at page 274, discusses the *Eastman* case, and stated as follows:

> "In *Eastman*, the United States Court of Appeals affirmed the decision of the District Court suppressing the evidence obtained as a result of the intercepted conversations. Though discussing several grounds for suppression, the *Eastman* court stated that 'the touchstone' of its decision was that the case was 'not one in which an inventory was delayed but rather (was) one in which specific provisions of Title III were deliberately and advertently not followed. In other words the failure to file the notice or inventory (was) no mere ministerial act. It resulted from a judicial act which on its fact deliberately flouted and denigrated the provisions of Title III designated for the protection of the public.'" 465 F. 2d at p. 1062

The Court of Appeals noted that the Appellate Division had adopted the reasoning of *Eastman*, but the Court went on to conclude that "with due respect for the authority of the *Eastman* case, we are not convinced that its reasoning should be followed." The United States Supreme Court has, upon information and belief, denied certiorari to your Petitioner, and no further appeal can be taken, thereby exhausting my remedies.

7. That Petitioner's detention by Respondent violates her rights under the Fourth, Fifth and Fourteenth Amend-

ments to the Constitution of the United States of America, in that

(a) the eavesdropping warrant discussed hereinabove was not made and executed in accordance with Federal and State Law governing the use of such warrants, as found by the District Court of the Middle District of Pennsylvania and as affirmed by the Third Circuit of the United States Court of Appeals.

(b) the use of such warrant in obtaining the judgment of conviction thereby violated your Petitioner's rights under the Fourth Amendment, in that it constituted an unlawful search and seizure.

(c) the failure of the prosecution and the law enforcement authorities to comply with Federal and States laws applicable to such warrants deprived your Petitioner of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

8. That following the decision of the New York Court of Appeals I learned by hearsay that certiorari was denied by a Justice of the United States Supreme Court. Through all of the proceedings I have been represented by an attorney retained by my codefendant. I was then advised to surrender to the Sheriff of Rockland County, the Respondent herein, on Monday, December 2, 1974, which was yesterday. At that time my present attorneys, Windheim, Bernard & Prindle, of Nyack, New York, appeared at the County Court, Rockland County, together with the representatives of the District Attorney of Rockland County. Lorna Bernard, a member of the firm, made application for a stay of my surrender pending an application to the Court. However, the County Judge directed that I surrender on Tuesday, December 3, 1974 at one o'clock in the afternoon. The County Judge issued a bench warrant which is held in abeyance pending my surrender. This Petition is being submitted to this Court

after I have surrendered, and I am in the custody of the Respondent.

9. That no previous application to this Court or to any other State or Federal Court has been made for a writ of habeas corpus, or any similar relief.

WHEREFORE petitioner prays to this Court as follows:

(a) That a writ of habeas corpus issue forthwith directed to Respondent requiring him to produce the body of Petitioner this day;

(b) That Petitioner forthwith be released on bail or in her own recognizance pending disposition of this proceeding for a writ of habeas corpus;

(c) That Petitioner be restored to her liberty;

(d) That a hearing be held to examine all the records and proceedings in this case and to inquire into the cause of Petitioner's detention; and

(e) That Petitioner be granted such other and further relief as to this court may seem just and proper.

Dated: Nyack, New York
December 3, 1974.

Respectfully submitted,

s/ BONNIE KERR
Petitioner

Appendix I—Decision, Hon. Inzer B. Wyatt.

BONNIE KERR,

Petitioner,

v.

RAYMOND A. LINDEMANN, SHERIFF OF THE COUNTY OF ROCKLAND,

Respondent.

74 Civ. 5264

This is an application for the writ of habeas corpus (28 U.S.C. §2241) by Bonnie Kerr, who is in the custody of respondent under a judgment of conviction of the Rockland County Court entered April 20, 1971. Kerr was found guilty by a jury of drug offenses, along with a co-defendant, Anthony Hueston, also known as Tony DeJeste.

An eavesdropping warrant was signed by a justice of the New York Supreme Court and telephone conversations were intercepted, but notice was not thereafter given as required by state and federal law. The defendants had actual notice, however, and timely motions to suppress were made.

For reasons to be explained, exactly the same issue has been considered by the United States Court of Appeals for the Third Circuit, which held that the interception was unlawful, and by the Court of Appeals of the State of New York, which held that the interception was lawful.

The conclusion of this Court is that the interception was lawful and that the present application must be denied.

Appendix I—Decision, Hon. Inzer B. Wyatt

1.

On June 2, 1969, Mr. Justice Hoyt of the New York Supreme Court in Rockland County signed an "eavesdropping warrant" directing that a wiretap be placed on the telephone line of applicant Kerr. This was done under the authority of provisions of the New York Code of Criminal Procedure (CCP; §§ 813-k, 514-825), replaced effective September 1, 1971, by the Criminal Procedure Law (the restating provisions being in Article 700 "Eavesdropping Warrants," §700.05 and following).

When Mr. Justice Hoyt signed the warrant the CCP (§823) required that, within 60 days of the "termination" of the warrant (or any renewals), written notice must be served on the person named in the warrant or on the telephone subscriber. This notice was required to be of the issuance of the warrant and of the period of authorized eavesdropping. Effective June 25, 1969, CCP §823 was repealed and replaced by a provision (CCP §822) requiring that the written notice must be given within 90 days (rather than 60, as theretofore). This was doubtless part of a purpose by New York to conform its wiretapping laws to those enacted by Congress in 1968.

When the warrant was signed on June 2, 1969, federal law (18 U.S.C. §2515) forbade the receipt in evidence in any federal or *state* court of any intercepted communication if its disclosure would be in violation of federal wire interception laws. Federal law (18 U.S.C. §2518(8)(d)) also required that within 90 days of the termination of an intercept order the judge must cause an "inventory" to be served on the persons named in the order. The inventory must include notice of entry of the order, the date of its entry, the period of authorized interception, and whether communications were or were not intercepted. Federal law (18 U.S.C. §2518(9)) also forbade the receipt in evidence in any federal or *state*

court of any intercepted communication unless, at least 10 days before the trial, each party has been furnished with a copy of the order and application therefor authorizing the interception. The judge may waive this 10 day period if he finds that it was not possible to comply with the 10 day rule and that the party is not prejudiced by delay.

A process copy of the June 2, 1969 warrant has been supplied. This indicates that the form of warrant was submitted with the application and that the Justice by hand filled in dates. The typed last sentence of the warrant reads:

> "That notice to the said Tony Dejeste and Bonnie Kerr is hereby expressly waived".

The period of the warrant was from June 2 to June 22, 1969. Apparently, at some time before June 22 the warrant was extended by order to July 10, 1969, at which time the period of authorized wiretapping expired.

There was a tap on Kerr's telephone during the authorized period and incriminating evidence was intercepted. On July 5, 1969, a search warrant was issued and on July 10, 1969, there was a search of Kerr's apartment under that warrant.

On August 12, 1969, a Rockland County Grand Jury returned an indictment charging Hueston and Kerr with drug offenses.

No notice was ever given to Kerr (or to Hueston) as required by New York law nor was any inventory ever served on them as required by federal law. Nevertheless they had actual notice of the wiretap warrant by at least September 26, 1969.

On papers dated September 26, 1969, counsel for defendants moved to obtain copies of the wiretap warrant and the papers on which it was based. Apparently this motion was denied by the Rockland County Court.

Defendants then secured new counsel and a second motion for discovery of the wiretap warrant and supporting papers were made. This motion was granted by the state court on March 17, 1970, and shortly thereafter counsel for defendants secured copies of these papers. It is represented that counsel also secured copies of the transcripts of the intercepted conversations.

Counsel for defendants then moved in Rockland County Court to suppress all evidence secured by the wiretaps, this because of the failure to give notice and to serve an inventory. The motion was denied by order entered December 3, 1970.

Counsel for defendants then moved to suppress all evidence secured under the search warrant, this because such warrant was based on intercepts under an illegal wiretap warrant. This motion was denied by order filed March 1, 1971.

Trial of defendants then took place in March 1971. The jury returned a verdict of guilty and on April 20, 1971, sentences were imposed and judgment of conviction entered in the Rockland County Court.

2.

Meanwhile, an indictment was returned against Hueston and Eastman (but not applicant Kerr) in the United States District Court for the Middle District of Pennsylvania. This was based in part on evidence secured under the two warrants executed in Rockland County.

A motion to suppress this evidence was made and on May 27, 1971 was granted by Judge Muir (*United States v. Eastman,* 326 F. Supp. 1038 (M.D. Pa. 1971)). The government appealed and on August 8, 1972, the order of Judge Muir was affirmed by the Court of Appeals for the Third Circuit (465 F. 2d 1057).

The federal indictment has since been dismissed.

3.

Kerr and her co-defendant then perfected their appeals from the Rockland County Court conviction.

On August 13, 1973, the Appellate Division, Second Department, reversed the judgment of conviction (42 A. D. 2d 860, 347 N. Y. S. 2d 78), accepting the opinion and conclusion of the Third Circuit Court of Appeals. Two justices dissented (with opinion).

On May 2, 1974, the Court of Appeals of New York unanimously reversed (34 N. Y. 2d 116, 356 N. Y. S. 2d 272), declining to follow the Third Circuit Court of Appeals. Judge Rabin wrote a persuasive opinion.

Kerr and her co-defendant are asking for a writ of certiorari from the United States Supreme Court, but there has been no decision as to this. A motion by Kerr and her co-defendant for a stay was denied by Mr. Justice Marshall on November 20, 1974. Applicant Kerr has surrendered and is in the custody of respondent.

4.

While it is theoretically possible that a writ of certiorari may be granted by the Supreme Court, Kerr has exhausted her remedies in the *state* courts and therefore may ask for relief here. 28 U.S.C. §2254(b); *Fay v. Moia,* 372 U. S. 391, 435-438 (1963).

5.

Admittedly there was no compliance with the notice requirements of New York and federal law. The persons whose telephone calls were intercepted had actual notice, however, and long before their trial had copies of the wiretap warrant, and search warrant, all supporting papers, and (it seems) transcripts of all intercepts. Their

motions to suppress were timely made and considered in the light of all this information. Failure to comply with the notice provisions after termination of the intercepts did not in this instance cause any prejudice to Kerr.

The wiretap warrant was not void on its face. It is not required that the warrant direct notice nor is it permitted to waive notice in the warrant. The *statutes*, not the warrants, require the giving of notice and nothing in the warrant can affect this protection to the parties and the public. The stated waiver in the warrant here (assuming that it was meant to refer to post termination notice) was a nullity. The intercepts were lawful when made because the warrant complied in all respects with the law.

The reasoning of the Third Circuit is that the waiver in the warrant was "a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public." (465 F. 2d at 1062) This is too extreme a conclusion. The judge in signing the warrant did not himself insert the waiver; he accepted the form of warrant presented. It is by no means clear that the waiver of notice was meant to refer to the notice *after* termination. In the Appellate Division, the dissenting justices felt that the waiver referred to notice before or during interception. Whatever may be the proper interpretation, the terms of the warrant did not and could not affect the statutory requirements as to notice. The failure to observe those requirements caused no prejudice to Kerr because she had actual notice and her rights to move to suppress before trial were fully protected.

This Court is satisfied that the reasoning of the New York Court of Appeals is sound. The contrary conclusion of the Third Circuit Court of Appeals cannot be accepted.

There is no decision on the precise point by our Court of Appeals. It is noted, however, that where notice of intercepts was not given until six months after their termination, this delay was not found to make the interception unlawful. *United States v. Manfredi*, 488 F. 2d 588, 601-02 (2d Cir. 1973), cert. denied, 94 S. Ct. 2651 (June 3, 1974) The decision in *United States v. Rizzo*, 492 F. 2d 443, 447 (2d Cir.), cert. denied, 94 S. Ct. 3069 (June 10, 1974) seems also significant. There, the required notice was not given until one month after it should have been given. The Court of Appeals emphasized that it was "still five months before the suppression hearing" and that the "touchstone" was "prejudice to the defendant" (492 F. 2d at 447). Because no "actual prejudice" was claimed, the wiretap evidence was admitted. There is no claim of actual prejudice in the case at bar, nor could there be. The wiretap evidence was properly admitted against Kerr.

The application for a writ of habeas corpus is denied. Because of the conflict with the Third Circuit decision, a certificate of probable cause will issue (28 U.S.C. §2253).

So Ordered.

Dated: December 11, 1974

INZER B. WYATT
United States District Judge

Appendix J—Notice of Appeal.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BONNIE KERR,

Petitioner,

against

RAYMOND A. LINDEMANN, SHERIFF OF THE COUNTY OF ROCKLAND,

Respondent.

74 Civ. 5264

Notice of Appeal.

Name and Address of Appellant:

Bonnie Kerr, presently residing in the County Jail, County of Rockland, New City, New York.

Name and Address of Appellant's Attorneys:

Windheim, Bernard & Prindle, 145 Main Street, Nyack, New York, 10960.

An order dated December 11, 1974 denying an application for a writ of habeas corpus was served upon the undersigned attorneys for appellant on the 12th day of December, 1974. Said order granted a certificate of probable cause. The appellant had been convicted in the County Court, Rockland County, of criminal possession of dangerous drugs in the Third and Fourth Degrees. Ap-

peal was made to the Appellate Division of the Supreme Court of the State of New York, Second Department and to the New York Court of Appeals. Appellant was sentenced to one year in the County Jail on April 21, 1971.

The name of the institution where appellant is now confined:

Rockland County Jail, New City, New York.

The appellant herein, hereby appeals to the United States District Court for the Second Circuit from the above stated judgment.

Dated: Nyack, New York
January 13, 1975

WINDHEIM, BERNARD & PRINDLE
Attorneys for Petitioner
145 Main Street
Nyack, N. Y. 10960

To:

Diana Rivet,
County Attorney
County of Rockland
County Office Building
New Hempstead Road
New City, N. Y. 10956